

AN ORDINANCE **101835**

APPROPRIATING FUNDS IN AN AMOUNT NOT TO EXCEED \$4,248,276.00; ACCEPTING AN UNDERGROUND STORM WATER EASEMENT AND AUTHORIZING THE EXECUTION OF A DEVELOPER PARTICIPATION CONTRACT (BROADWAY CORRIDOR WATERSHED SA6) BETWEEN THE CITY OF SAN ANTONIO AND GUENTHER DEVELOPMENT, LLC, IN CONNECTION WITH THE BROADWAY CORRIDOR PHASE I, PART II, A 2005 STORM WATER REVENUE BOND PROJECT LOCATED IN COUNCIL DISTRICT 2; AND PROVIDING FOR PAYMENT.

* * * * *

WHEREAS, the construction of drainage infrastructure in the Broadway Watershed will reduce flooding and increase public safety; and

WHEREAS, a developer participation agreement, pursuant to Sections 212.071, *et seq.* of the TEXAS LOCAL GOVERNMENT CODE, will further the construction of the project and provide a drainage easement; and

WHEREAS, the City's share of the costs will be capped at \$4,248,276.00, **NOW THEREFORE**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. The City Manager or her designated representative, is hereby authorized to execute an Agreement with the developer, Guenther Development LLC, in substantially the form appended hereto and incorporated herein as **Attachment I**, for the construction of drainage infrastructure from the intersection of Alamo and Cunningham Streets (near the East right of way line of Broadway Avenue) under the property and Avenue B, to the Catalpa Pershing Channel in Brackenridge Park and the conveyance of a Drainage Easement across the subject property to the City.

SECTION 2. The proposed agreement must be executed within 45 days of signing of this Ordinance; otherwise, the agreement must be considered through a subsequent ordinance. Should an agreement be negotiated which substantially varies from the terms of the appended **Attachment I**, the agreement must be considered through a subsequent ordinance.

SECTION 3. The following financial adjustments are hereby authorized to effect this Ordinance:

(a) The amount of \$4,248,276.00 is appropriated in fund 48004000, 2005 Storm Water Revenue Bonds, WBS RB-00084-01-01-13 GL account 6102100 – Interfund Transfer out entitled Transfer to 23-03728-90-03. The amount of 4,248,276.00 is authorized to be transferred to fund 48099000.

(b) The budget in fund 48099000, Project Definition 23-03728, Broadway Corridor Phase I, Part II shall be revised by increasing WBS element 23-03728-90-03 entitled TRF FR WBS RB-00084-01-01-13, GL account 6101100 – Interfund Transfer In, by the amount of \$4,248,276.00.

(c) The amount of \$4,248,276.00 is appropriated in Fund 48099000, Project Definition 23-03728, Broadway Corridor Phase I, Part II, WBS element 23-03728-05-02-01 is authorized to be encumbered and made payable to G.H. Guenther & Son, Inc.

SECTION 4. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance may, subject to concurrence by the City Manager, or her designee, correct allocation to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 5. This ordinance becomes effective on December 25, 2005.

PASSED AND APPROVED this 15th day of December, 2005.



M A Y O R

PHIL HARDBERGER

ATTEST:


City Clerk

APPROVED AS TO FORM:
Office of the City Attorney

By


City Attorney

ATTACHMENT I

Draft 9/30/Final 12-7-05

DEVELOPER PARTICIPATION CONTRACT BROADWAY CORRIDOR WATERSHED SA6 STORM WATER DRAINAGE PROJECT

THIS DEVELOPER PARTICIPATION CONTRACT for certain considerations regarding a storm water drainage project in the area of the southwest corner of the intersection of Broadway Avenue and Cunningham Street, in the City of San Antonio, Bexar County, Texas, dated as of _____, 2005 (hereinafter the "Effective Date") is entered into by and between **THE CITY OF SAN ANTONIO, TEXAS**, a Texas municipal corporation, and **GUENTHER DEVELOPMENT, LLC**, a Texas limited liability company, pursuant to Ordinance No. _____ passed by the City of San Antonio City Council on _____, 2005.

RECITALS

Whereas, Developer is the owner of the Property. The area surrounding the Property is subject to flooding and drainage problems.

Whereas, the construction of the Project is in the City's interest and obtaining the Construction Documents (as defined below) and the Drainage Easement (as defined below) will further the Project.

Whereas, receipt of the Construction Documents and the Drainage Easement will benefit the City because, among other things: (i) the Project (as defined below) will reduce flooding in the area of the Broadway Watershed SA6 and will increase public safety in the area adjacent to the Property; (ii) the City will obtain the Drainage Easement without monetary consideration; and (iii) the Project will enable economic development of the Property and the areas surrounding the Property.

Whereas, this Contract benefits Developer by allowing a drainage facility to be constructed which will capture and handle floodwaters from Broadway Drainage Watershed SA6, thereby improving the use of and access to the Property.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, do hereby covenant and agree as follows:

A. DEFINITIONS:

Certain terms used in this Contract (defined below) shall have the meanings set forth as follows:

1. "City" means the City of San Antonio, Texas, a Texas municipal corporation.

2. "City Share" means ninety-six percent (96%) of the engineering costs and expenses required to prepare the Construction Documents and ninety-six percent (96%) of the cost and expenses to construct the Project (i.e., City Share equals the sum of City Share/Plans and City Share/Facility). In no event shall City Share exceed \$4,248,276 without a written agreement to the contrary between the parties.

3. "City Share/Plans" means ninety-six percent (96%) of the costs and expenses to prepare the Construction Documents, including but not limited to, all engineering fees and expenses for all studies, opinions of probable costs and other work performed by the Project Engineer related to Watershed SA6. In no event shall City Share/Plans exceed \$294,981.

4. "City Share/Facility" means ninety-six percent (96%) of the costs and expenses to construct the Project. In no event shall City Share/Facility exceed \$3,953,295.

5. "Contract" means this Developer Participation Contract between the City of San Antonio, Texas and Guenther Development, LLC.

6. "Contract Documents" means this Contract and Exhibit A through Exhibit E attached hereto and made a part hereof for all purposes.

7. "Construction Documents" means the plans, specifications and estimates for the Project which shall be provided by the Developer pursuant to the terms of this Contract. The Construction Documents shall illustrate the dimensions, materials, methods of construction, methods of excavation, and other details of the Project. A list/description of the Construction Documents is provided in Exhibit C.

8. "Developer" means Guenther Development, LLC, a Texas limited liability company, ~~which is wholly owned by C.H. Guenther & Son, Inc., a Texas corporation, or any other entity that is wholly owned, directly or indirectly, by C.H. Guenther & Son, Inc.~~

9. "Director" means the Director of Public Works, City of San Antonio.

10. "Drainage Easement" means the underground stormwater drainage easement to be conveyed by Developer to City in the location described specifically in the Easement Document (as defined below).

11. "Easement Document" means the form of conveyance document used to convey the Drainage Easement by Developer to City set forth on Exhibit B attached hereto and made a part hereof for all purposes.

12. "Project" means the drainage facility and improvements to be constructed by Developer that is represented and depicted in the Construction Documents, being underground box culverts and related improvements extending from the intersection of Alamo and Cunningham Streets (near the east right-of-way line of Broadway Avenue) to the Catalpa Pershing Channel in Brackenridge Park.

13. "Project Engineer" means Pape-Dawson Consulting Engineers, Inc.

14. "Property" means the real property, comprising approximately 5.408 acres, situated in the City of San Antonio, Texas, owned by Developer, and more fully described in Exhibit A.

15. "Work" means the installation and construction of the Project by Developer in accordance with the Construction Documents and as provided herein.

B. CONTRACT PROVISIONS

1. Background. This Contract qualifies as a "Developer Participation Contract" pursuant to Sections 212.071-212.072 et. seq. of the TEXAS LOCAL GOVERNMENT CODE. In this regard, Developer shall construct the Project on the Property running roughly 675 feet from the intersection of Alamo and Cunningham Streets (near the East right-of-way line of Broadway Avenue), under the Property and Avenue B, to the Catalpa Pershing Channel in Brackenridge Park. In order to adequately carry the onsite water resulting from a 100-year storm event, the drainage facility would have been sized to carry approximately 57 cfs of storm water runoff from the Property. To accommodate City needs, Developer has agreed to oversize this facility to convey 1503 cfs relating to stormwater generated from approximately 343 acres upstream of the Property. City shall pay the cost for oversizing the original facility by paying the City Share. The total cost of the Project is estimated to be \$4,425,288. A detailed estimate of the cost of the Project is attached hereto as Exhibit D. A calculation of the City Share is also illustrated in Exhibit D. A depiction of the Project is attached as Exhibit E and made a part hereof for all purposes.

2. Drainage and Other Easements. Developer shall convey the Drainage Easement to City pursuant to and in the form of Exhibit B. The Easement Document shall be executed by Developer, as Grantor, simultaneously upon execution of this Contract and shall be held in escrow by AmeriPoint Title Company (Doreen Chacon) (the "Escrow Agent") until the earlier of: (i) receipt by Developer of City Share and acceptance of the Project by City, or (ii) the occurrence of a Default (as defined below) by Developer, at which time the Easement Document shall be recorded in the Real Property Records of Bexar County, Texas. Developer and/or City may notify the Escrow Agent in writing of the occurrence of either of the conditions set forth in items (i) or (ii) of the preceding sentence. If one party sends such a notice to the Escrow Agent without joinder of the other party, such party shall send a copy of such notice to other party in accordance with Paragraph 17 below. Escrow Agent shall record the Easement Document in the Real Property Records of Bexar County, Texas, within three (3) days after receipt of a notice signed by both parties, or at any time that is 15-30 days after receipt of a notice signed by only one of the parties provided that no legal action has been filed to restrain, enjoin or otherwise prevent the filing of the Easement Document. The Drainage Easement shall be free of encumbrances at all times prior to actual release to City, other than as set forth in Exhibit B.

City shall provide or be responsible for obtaining any easements (other than the Drainage Easement) or the necessary permission required to construct the Project, including third-party consents and approvals, subject to any other governmental requirements or controls. In addition, City shall be responsible for obtaining any permission required to relocate any utilities in connection with the construction of the Project.

3. Construction. Developer shall commence construction of the Project within ten days after the later of (i) execution and delivery of this Contract by City and Developer, (ii) approval of the Construction Documents by the Director, and (iii) receipt by Developer of all governmental and regulatory permits and approvals required in connection with the construction of the Project. Developer's obligation to commence construction of the Project is conditioned upon the receipt by Developer of such permits and approvals on such terms and conditions as Developer may deem to be acceptable in Developer's reasonable discretion. City agrees use its best efforts (without cost or expense to City) to obtain and shall assist Developer in obtaining all permits and approvals required in connection with the Project. Without limiting the foregoing, City agrees to use its best efforts (without cost or expense to City) to apply for and obtain all requisite approvals from the Texas Department of Transportation and the party that owns and controls the Catalpa Pershing Channel required in connection with the construction of the Project. Construction of the Project shall at all times be performed in a good and workmanlike manner using only first class materials as specified in the Construction Documents. Only new materials shall be used. Construction shall be performed in accordance with the approved Construction Documents. Any variations from same shall require approval by City's Representative. In the event change orders are necessary in connection with the construction of the Project, Developer shall submit the same to City's Representative for its review and approval, not to be unreasonably withheld. Upon written approval of any change order by both Developer and City's Representative, the cost of the Project shall be adjusted to the extent the same is modified thereby and the City Share/Facility shall also be correspondingly adjusted. Notwithstanding the foregoing, Developer acknowledges it has knowledge of the limits on City's authority to fund only up to the maximum amount specified in this Contract plus any contingency amount as approved by ordinance. The Project may be designed and built in stages as Developer may determine subject to City's reasonable approval.

Notwithstanding the foregoing, Developer may, at its option, submit periodic draw requests to City no more often than once per month during construction of the Project, for payment of that portion of City Share/Facility as may be attributable to the completed construction of the Project since the last periodic draw request. Any such draw request shall be accompanied by a certificate from the Project Engineer certifying the amount of work performed to date on the Project on a percentage of completion basis, confirming that such work was performed in accordance with the Construction Documents, stating the amount of the City Share/Facility attributable thereto, and including a breakdown of labor, names of contractors and materials used. City shall pay the portion of City Share/Facility covered by such periodic draw request within thirty (30) days following City's receipt thereof. City shall not be liable to Developer, Contractor or any third parties for any delays with regard to construction of the Project other than those directly and actually caused by City and which are beyond the City's customary application of developmental processes.

Developer shall enter into a contract (the "Construction Contract") for construction of the Project with a licensed contractor selected by Developer (the "Contractor") subject to City's approval, which approval shall not be unreasonably withheld provided such contractor has the proven capacity, solvency and expertise to construct the Project. Once commenced, Developer shall cause construction of the Project to be prosecuted diligently and continuously until completion in accordance with the Construction Documents as certified jointly by the Project Engineer and the Director. The Director shall have the authority to accept the Project on behalf

of City, and City shall accept ownership and maintenance of the Project upon approval of the completed Project by the Director.

Prior to the commencement of construction, the Developer shall provide City with (i) payment and performance bonds in form in accordance with the Texas Local Government Code and the Texas Insurance Code reflecting the City as beneficiary thereunder, and (ii) insurance certificates showing the City as a named insured in types and amounts reasonably required by the City's Risk Management Department. The foregoing shall remain active throughout the course of construction of the Project.

The Construction Contract shall prohibit third party beneficiaries other than City which shall be specifically designated as a third party beneficiary, shall not be assignable by the Contractor and shall provide City access to the Project at any time. The Contractor shall acknowledge therein that it has read this Contract and understands that City has certain rights hereunder and pursuant to the Construction Contract. The Construction Contract shall provide for City access to the Project at all reasonable times for inspection purposes. "As Built" Plans shall be provided to the City no later than 60 days after completion of the Project, as jointly certified by the Project Engineer and the Director.

During construction of the Project Developer shall provide City's Representative with quarterly status reports showing the percentage of completion of the Work and expenditures incurred in connection with the construction of the Work.

4. Inspections. The Project shall be accessible at all times to the Director or his designee for inspection. The Developer acknowledges any inspections performed by City for purposes of this Contract (as opposed to routine building and construction inspections performed by City for permitting and acceptance purposes common to all similar construction projects) are for the benefit of City only and may not be relied upon by others, be claimed by Developer as an approval by City, a permit granted by City, a waiver by City, or used for any purpose by Developer, the Contractor or any third party. Developer further acknowledges that Developer and Contractor are required to perform their own inspections and inspections by City do not address any obligations of Developer or others.

5. Construction Documents. Developer shall provide City with a complete set of Construction Documents meeting the requirements of this Contract ~~no later than~~ 2006, within 90 days after completion of an underground utility survey of Broadway. Construction of any part of the Project shall in no event commence prior to City approval of the Construction Documents for that part of the Project. The Construction Documents shall be prepared in accordance with the requirements of this Contract and be prepared by and bear the seal of the individual engineer working on behalf of the Project Engineer. City shall pay to Developer City Share/Plans thirty (30) days after receipt and approval of the Construction Documents by the Director. Developer shall cause the Project Engineer to commence preparation of the Construction Documents promptly upon full execution of this Contract and to diligently continue same to completion. Developer shall provide City with copies of Project Engineer's invoices for the Project as such invoices are received by Developer. The Construction Documents shall conform to all applicable local, state and federal codes and regulations and customary engineering practices. City shall own the Construction Documents upon payment of

City Share/Plans and Developer shall obtain and provide Project Engineer's assignment of its interest to City. Developer hereby assigns its interest in the Construction Documents to City, to become effective upon receipt by Developer of City Share/Plans. City shall own the Construction Documents for all purposes and may duplicate them, license them, use them and re-use them for any and all purposes.

6. Warranty. If the Work is found to be defective, either wholly or in part, and/or found to be non-conforming with the Contract Documents and/or the Construction Documents during the 12-month period following acceptance of the Project by City, Developer shall correct such defective or non-conforming Work within thirty (30) days of notice thereof given by City. Developer may take such longer time to correct such Work as may be reasonably necessary, provided Developer is working diligently and continuously towards a cure. If Developer fails to cure such defective or non-conforming Work, then City may, at its own expense, correct such defective or non-conforming Work, by City's own crews, or by outside contractors, and the reasonable cost of such correction shall be deemed to be sums due City by Developer, at City's option, pursuant to this Contract, and may be offset against any other outstanding sums due by City to Developer under the Contract. The cost of City crews shall be determined by prevailing market rates for performing the work required to correct such defects and/or labor. Upon completion of the Project, as previously defined, all available product and material warranties, including all warranties given by Contractor, shall be provided and/or assigned to City to the extent assignable. This Contract shall be deemed to operate as an assignment of same. This provision shall survive termination of this Contract.

7. Default. Upon the occurrence of a default by Developer in the performance of its obligations hereunder and the failure of Developer to cure such default within thirty (30) days following receipt of written notice of default from City (or such reasonably longer time as may be necessary provided the Developer commences the cure within thirty (30) days and continuously and diligently pursues the cure to completion) (a "Default"), City shall have the right to terminate this Contract.

In the event of Default by Developer, City may require Developer to cease construction and City may, at its option, take over construction of the Project with its own contractor. In such event, the Easement Document shall be recorded in the Real Property Records of Bexar County, Texas, and this Contract shall operate as an agreement by Developer to allow City access to the Property as necessary to complete the Project. These remedies are in addition to any money damages and/or legal, equitable and/or other contract rights City may have in the event of a Default; provided that it is expressly agreed that neither party shall have the right to seek consequential, special or punitive damages against the other for any default under this Contract.

8. Record. This Contract, at City's option, may be filed and recorded in the real property records of Bexar County, Texas. This Contract is a covenant that shall be and is binding on subsequent owners of the Property or any part thereof, and operates as a covenant that runs with the land.

9. Representatives. The City hereby designates the Director and/or such other person or persons as the Director may hereafter designate upon prior written notice to Developer, as the "City's Representative." Developer hereby designates Thomas A. McRae, or such other

person as Developer may hereafter designate upon prior written notice to the City, as "Developer's Representative."

10. Representations and Warranties. Developer and City represent, warrant, certify and agree that neither this Contract, nor the Contract Documents, nor any part of the relationship between the parties hereto shall be construed in any way or operate as creating a joint venture, partnership or other business entity between Developer and City.

11. Assignment. Developer may not assign its rights or obligations under this Contract without the prior written consent of City. Any such assignment, whether voluntary or involuntary, by operation of law, under legal process or proceedings, by receivership, in bankruptcy or otherwise, without the prior written consent of City shall, at City's option, be of no force and effect whatsoever. Any consent to any such assignment or transfer shall not constitute a waiver of any of the restrictions of this section and the provisions of this section shall apply to each successive assignment or other transfer hereunder, if any. This section of this Contract shall have no effect on any other provisions of this Contract.

12. Indemnity. During the performance of the Work Developer shall direct the Contractor(s) and other contractors to exercise care to avoid accident or injury to persons and/or property and/or the Property and maintain sufficient barriers, signs and all necessary safeguards, including watchmen, if necessary, in order to protect against accidents. Developer shall also direct the Contractor(s) and other contractors to maintain adequate lighting, reflective and other warning devices, and take reasonable precautions to protect persons and property and prevent accidents and damage arising out of the Work. Developer shall defend, protect, indemnify and hold harmless City from and against all claims, damages to persons or property, demands, causes of action, liability or proceedings and all costs and expenses of any kind and attorneys' fees and cost of suit, arising, in whole or part, whether now known or otherwise, out of or resulting from Developer's and/or Contractor's performance of the Work and/or Developer's other obligations under this Contract, the Contract Documents, and/or the Construction Documents. This provision survives termination and/or expiration of this Contract.

Notwithstanding the foregoing paragraph, COSA City and Developer agree that this indemnity shall not operate to alter, remove or waive any governmental immunity available in connection with the Project.

13. Entire Agreement. The terms of this Contract are intended to be a final expression of the parties agreement and may not be contradicted by evidence of any prior or contemporaneous statements, representations, agreements or understandings, whether written or oral. The parties expressly agree that no such statements, representations, agreements or understandings exist. The parties further intend that this Contract constitutes the complete and exclusive statement of the parties' intent and that no extrinsic evidence may be introduced in any proceeding involving the Contract Documents. No addition to, deletion from, or modification of any term or provision of this Contract shall be effective unless it is made in a writing signed by the parties hereto.

14. Conflicts Between Documents. In the event of any conflict between the Exhibits hereto and the terms and provisions of this Contract, the terms and provisions of this Contract shall control; provided, however, that the Easement Document is and shall be a complete and final expression of the terms of the Drainage Easement and shall be interpreted, construed and enforced without reference to this Contract.

15. Waiver. It is understood and acknowledged that City exercises no control over the means of accomplishing the Work. No approval by City shall impose any liability on City for any risk or damage to persons or property or the Property or shall imply or guarantee any drainage implications or the operation of the drainage facilities to the parties, any other party or otherwise.

16. Attorneys' Fees. If either party commences an action against the other to enforce any of the terms of this Contract or for damage relative to this Contract, the losing party shall pay to the prevailing party the costs and expenses incurred in connection with the prosecution or defense of such action, including reasonable attorneys' fees and all other costs of suit.

17. Notices. Any notice required or permitted to be given under this Contract shall be in writing and shall be (1) mailed by certified mail, postage prepaid, return receipt requested, or (2) delivered by a nationally recognized overnight air or ground courier service, at its address set forth as follows:

If to Developer:

Guenther Development, LLC
Attn: Thomas A. McRae
127129 E. Guenther
San Antonio, TX 78204
Telephone No.: (210) 351-6252

If to City:

City of San Antonio
Attn: Thomas Wendorf, P.E. Director of Public Works
P.O. Box 839966
San Antonio, Texas 78283-3966
Telephone No.: (210) 207-8024

City of San Antonio
Attn: _____, Assistant City Attorney
P.O. Box 839966
San Antonio, Texas 78283-3966
Telephone No.: (210) 207-8940

Any communication so addressed and mailed shall be deemed to be given on the earliest of: (a) when actually received or delivered; (b) when proof of return of certified mail is received; or (c) on the first business day after deposit with an overnight air courier service, if proof to the address of the intended addressee is provided. A change of address may be given by written notice as provided herein.

18. Third Party Beneficiaries. There shall be no third party beneficiaries to this Contract.

19. Partial Invalidity. Any provisions or part of this Contract held to be void or unenforceable under any law or regulation shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon the parties and construed as close as reasonably possible to their original intent.

20. Authority of Signatory. The persons signing on behalf of each of the parties to this Contract represent that they each have the authority to bind their respective party to this Contract. The signature on this Contract or any document on behalf of City is subject to passage of an ordinance approving the authority of such signatory.

21. Gender and Number, Other Terms. Where the context of this Contract permits, the singular shall include the plural, the plural the singular, and the masculine shall include the neuter and feminine.

22. Governing Law and Venue. This Contract shall be construed and interpreted under and shall be governed and enforced according to the laws of the State of Texas. Venue for any legal proceeding arising out of or in connection with this Contract shall be in Bexar County, Texas.

23. No Oral Modification. This Contract shall not be modified orally or by course of conduct or dealing. Any modification of this Contract shall be in writing and signed by the authorized party.

24. Counterparts. The Contract Documents may be executed in counterparts, each of which shall be deemed an original and together shall constitute a single instrument.

25. Force Majeure. In the event Developer or City is unable in whole or in part by force majeure to carry out any covenant, agreement, obligation or undertaking to be kept or performed under this Contract, the time for the performance of such covenant, agreement, obligation or undertaking so delayed shall be extended for the period of such delay, and such default shall be remedied with all reasonable dispatch. The term "force majeure" as employed in this section shall include acts of God, acts of terrorism, strikes, lockouts, or other industrial disturbances, acts of a public enemy, war, blockades, riots, epidemics, earthquakes, explosions, accidents, or repairs to machinery or pipes, the delays of carriers, or inability by reason of governmental regulation to obtain materials, acts of public authorities, or other causes, whether or not of the same kind as specifically enumerated, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

[Signatures on next page]

IN WITNESS WHEREOF, this Contract is entered into as of the day and year set forth above.

CITY:

CITY OF SAN ANTONIO,
a Texas Municipal Corporation

By: _____
Name: _____
Title: _____

DEVELOPER:

GUENTHER DEVELOPMENT, LLC, a
Texas limited liability company

By: _____
Name: _____
Title: _____

ACKNOWLEDGED AND AGREED TO ACT AS
ESCROW AGENT:

AmeriPoint Title Company

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on _____, 2005, by
_____ of the **CITY OF SAN ANTONIO**, a Texas
municipal corporation, on behalf of said corporation.

Notary Public, State of Texas

STATE OF TEXAS §
 §
COUNTY OF BEXAR §

This instrument was acknowledged before me on this _____ day of _____, 2005, by _____, the _____ of **GUENTHER DEVELOPMENT, LLC**, a Texas limited liability company, on behalf of said limited liability company.

Notary Public, State of Texas

Schedule of Exhibits:

- Exhibit A – Property
- Exhibit B – Underground Stormwater Easement
- Exhibit C – Construction Documents
- Exhibit D – Developer Cost Estimate
- Exhibit E – Depiction of Project

**EXHIBIT A
TO
DEVELOPER PARTICIPATION CONTRACT**

PROPERTY

See Attached

DRAFT

**EXHIBIT B
TO
DEVELOPER PARTICIPATION CONTRACT**

UNDERGROUND STORMWATER EASEMENT

STATE OF TEXAS §
 § KNOW ALL PERSONS BY THESE PRESENTS:
COUNTY OF BEXAR §

That, **GUENTHER DEVELOPMENT, LLC**, a Texas limited liability company ("Grantor"), acting by and through its duly authorized members, managers or officers, for and in consideration of One Dollar (\$1.00) and other good and valuable consideration in hand paid by the **CITY OF SAN ANTONIO**, a Texas municipal corporation ("Grantee"), the receipt and sufficiency of which are hereby acknowledged and confessed, has granted, sold and conveyed and by these presents does hereby grant, sell and convey unto Grantee, whose mailing address is P. O. Box 839966, San Antonio, Texas 78283-3966, an easement (the "Easement") for the specific purpose of permitting Grantee to operate and maintain an underground stormwater drainage culvert and related pipes, lines and appurtenances (collectively, the "Easement Appurtenances") within that certain real property located in the City of San Antonio, Bexar County, Texas, as more particularly described and shown by field notes attached hereto as **Exhibit A** and a drawing marked **Exhibit B** attached hereto and made a part hereof (the "Easement Area").

Grantee shall have the right to remove from the Easement Area by standard industry practices employed in vegetation management, all trees, and parts thereof, any vegetation or obstructions which interfere with the installation, maintenance, and/or repair of the Easement Appurtenances within the Easement Area.

Grantor reserves for itself and its tenants and their respective successors and assigns, with the right of assignment in whole or in part, the full and complete enjoyment of the Easement Area without limitation, including the right to use the surface of the Easement Area, except that Grantor's use of the Easement Area shall not unreasonably interfere with the rights specifically granted herein to Grantee. Grantor shall have the right to dedicate, construct, place, maintain, lay, inspect, protect, operate, repair, alter, substitute, replace and remove, except the Easement Appurtenances (i) surfacing materials, roads, streets, sidewalks, parking lots, landscaping and other improvements on, over, across and along the Easement Area, and (ii) telephone, electric, gas, sewer and water lines or public utilities across and through the Easement Area and such activities shall not constitute interference with the Easement so granted so long as such improvements on the Easement Area do not materially and unreasonably impair Grantee's use of the Easement. Grantor shall also have the right to connect the stormwater drainage lines and facilities serving Grantor's Property described in **Exhibit C** hereto ("Grantor's Property") into the Easement Appurtenances at such locations as may be necessary or desirable to allow the

transmission of the stormwater drainage from Grantor's Property into the Easement Appurtenances (the "Drainage Connections"), provided that such Drainage Connections are done at no cost to Grantee and in a manner that does not unreasonably interfere with the Easement rights of Grantee hereunder.

Grantor acknowledges that the Easement herein granted is paramount to the fee interest reserved by Grantor and is for the exclusive benefit of Grantee only. Notwithstanding any other provision contained herein, except for the Drainage Connections, Grantor may not dedicate, construct, place, maintain, lay, inspect, protect, operate, repair, alter, substitute, replace, remove, or in any way otherwise intrude in or on the Easement Appurtenances, including the outside surfaces thereof. Grantor may install and operate utility lines and other facilities within the Easement Area above, below and alongside the Easement Appurtenances but, except for the Drainage Connections, not within or attached to the Easement Appurtenances. Any underground utility lines or other facilities constructed or maintained by Grantor within the Easement Area shall either cross in a perpendicular direction to the Easement Appurtenances or shall run along either side (but not above or below) the Easement Appurtenances. Grantor's underground improvements (the "Improvements") in the Easement Area shall be installed and maintained at Grantor's own risk. Grantor shall provide Grantee with as-built drawings showing the location of the Improvements in the Easement Area within thirty (30) days of completion of each and all Improvements. In the event of any damage or destruction to the Improvements caused by Grantee in the course of Grantee's use of the Easement Area in accordance herewith, Grantor shall bear the cost of any repair or replacement and the cost of any damages of any kind resulting from such damage to the improvements (other than repairs to surface improvements such as paving or landscaping as provided below) whether or not such damages are sustained by Grantor or by third parties. In the event Grantee has the need to perform work in the Easement Area, Grantee shall notify Grantor in advance when feasible to do so.

The Easement does not constitute a conveyance of fee simple title to the Easement Area or of the minerals or mineral rights therein and thereunder, but rather a conveyance of the Easement only. This Easement is a grant that is subject to all matters of record in Bexar County, Texas validly subsisting against the Easement Area on this date, and all easements, rights-of-way and prescriptive rights, of record; all presently recorded restrictions, reservations, covenants, conditions, oil and gas leases, mineral severances and other instruments, other than liens and conveyances, that affect the Easement Area; rights of adjoining owners in any wells and fences situated on a common boundary; any discrepancies, conflicts or shortages in area or boundary lines; and any existing encroachments or overlapping of improvements (collectively, the "Permitted Exceptions").

Grantee shall maintain and repair the Easement Area and the Easement Appurtenances at its sole cost and expense, to the extent necessary to keep the Easement Area and the Easement Appurtenances in good condition and repair, and in compliance with all City and governmental ordinances, rules and regulations. Grantee shall have access over the drives and access ways situated from time-to-time on Grantor's Property so as to access the Easement Area at all times. Grantee shall promptly restore the surface of any property damaged by Grantee's use of the Easement, at Grantee's sole cost and expense, including without limitation restoration of any sidewalks, driveways, parking areas or similar surface improvements located upon or adjacent to

the Easement Area, which may have been removed, relocated, altered, damaged, or destroyed as a result of the Grantee's use of the Easement Area. Grantee shall remove any debris resulting from its use of the Easement Area pursuant to the Easement.

TO HAVE AND TO HOLD the Easement and rights unto Grantee, its successors and assigns, until the use of the Easement by Grantee shall be permanently abandoned. Grantor does hereby bind itself and its successors to warrant and forever defend all and singular the Easement and rights unto Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof, by, through or under Grantor, but not otherwise, subject to the terms, conditions and provisions set forth herein, including but not limited to the Permitted Exceptions.

EXECUTED this ____ day of _____, 20__.

GUENTHER DEVELOPMENT, LLC, a
Texas limited liability company

By: _____
Name: _____
Title: _____

STATE OF TEXAS

COUNTY OF BEXAR

§
§
§

This instrument was acknowledged before me on this ____ day of _____,
20__, by _____, the _____ of
GUENTHER DEVELOPMENT, LLC, a Texas limited liability company, on behalf of said
limited liability company.

Notary Public, State of Texas

Schedule of Exhibits:

- Exhibit A – Easement Area -- Field Notes
- Exhibit B – Easement Area -- Drawing
- Exhibit C – Grantor's Property

EXHIBIT "A"
TO
UNDERGROUND STORMWATER EASEMENT

LEGAL DESCRIPTION OF EASEMENT AREA

[To be attached]
See Attached

DRAFT

EXHIBIT "B"
TO
UNDERGROUND STORMWATER EASEMENT

DRAWING OF EASEMENT AREA

See Attached

[To be attached]

DRAFT

EXHIBIT "C"
TO
UNDERGROUND STORMWATER EASEMENT

GRANTOR'S PROPERTY

See Attached

[To be attached]

DRAFT

**EXHIBIT C
TO
DEVELOPER PARTICIPATION CONTRACT**

CONSTRUCTION DOCUMENTS

The Construction Documents shall be those plans, specifications and estimates for the Project which are to be provided by the Developer pursuant to the terms of this Contract and which will illustrate the dimensions, materials, methods of construction, methods of excavation, and other details of the Project, as provided by Project Engineer and approved by the City.

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**EXHIBIT D
TO
DEVELOPER PARTICIPATION CONTRACT**

DEVELOPER COST ESTIMATE

See Attached

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**EXHIBIT E
TO
DEVELOPER PARTICIPATION CONTRACT**

DEPICTION OF PROJECT

See Attached

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**CITY OF SAN ANTONIO
PUBLIC WORKS DEPARTMENT
CITY COUNCIL AGENDA MEMORANDUM**

TO: Mayor and City Council

FROM: Thomas G. Wendorf, P.E. Director of Public Works

SUBJECT: Execution of Developer Participation Contract between City of San Antonio and Guenther Development, L.L.C. for the Broadway Corridor Watershed SA6 Storm Water Drainage Project

DATE: December 15, 2005

SUMMARY AND RECOMMENDATIONS

This ordinance appropriates funds and authorizes the execution of a Developer Participation Contract between the City of San Antonio and Guenther Development, L.L.C. and authorizes the execution of an Underground Storm Water Easement agreement.

This ordinance also authorizes the City of San Antonio to pay for the cost in the amount not to exceed \$4,248,276.00 to oversize a drainage facility and its improvements extending from the intersection of Alamo and Cunningham Streets to the Catalpa Pershing Channel in Brackenridge Park (ButterKrust Site) in connection with the Broadway Corridor Phase I, Part II, a 2005 Storm Water Revenue Bond Project located in Council District 2.

Staff recommends approval of this ordinance.

BACKGROUND INFORMATION

December 9, 2004 the City Council approved a 19.5% Rate Increase to the Storm Water Fee to issue Storm Water Revenue Bonds that would allow for the funding of eleven Regional flood control projects. Regional flood control projects by definition have a drainage area greater than 1.5 square miles and provide a positive impact to the watershed in which they are located. Projects of this nature can be classified as infrastructure recapitalization, major storm water outfalls, regional storm water detention facilities, and low water crossing mitigation. The eleven projects approved were selected using the same selection criteria utilized for the 2003 Storm Water Revenue Bonds. This selection criteria included 1) Linkage with a Master Plan, 2) Ability to leverage non-city dollars, 3) Project initiation within four years, 4) Continuity of a prior authorized bond project, 4) Existence of completed engineering plan, 5) Public or Council request, 6) Safety, health or ADA Project and 7) Infrastructure Model.

Among these eleven projects the "Broadway Corridor, Phase 1" project was designated for construction. Storm water drainage improvements to the Broadway Corridor remains a priority among City Council. The ButterKrust site, which is in the Broadway Corridor is currently being

redeveloped by Guenther Development, L.L.C., into their corporate headquarters and test kitchens.

Part of the redevelopment effort of the project site, requires Guenther Development, L.L.C. to adequately carry onsite water resulting from a 100-year storm event by constructing a drainage facility on site that would carry approximately 57 cubic feet per second (cfs) of storm water runoff from the property. To accommodate City needs, Guenther Development, L.L.C. has agreed to oversize that drainage facility to convey 1503 cfs of storm water run off generated from approximately 343 acres upstream from the property. Guenther Development, L.L.C. has also agreed to grant to the City, for consideration for One Dollar (\$1.00), drainage easements on the ButterKrust Site for completion of the drainage improvements. This use of a Developer Participation Contract will result in an expedited construction schedule and cost savings that will result in a 12 – 18 month project implementation timesavings as well as significant cost savings to the City. This project also matches several of the bond project selection criteria such as: the leveraging of non-city dollars, project initiation within 4 years, and public or Council request.

Section 212 of the Texas Local Government Code allows municipalities to contract with a developer to construct public improvements related to the development and to participate in the cost thereof. This agreement provides funds from the City that will be used to pay for 96% of the engineering costs and expenses to prepare the construction documents, including engineering fees and expenses for studies, opinions of probable costs and other expenses related to the watershed and 96% of the cost and expenses to construct the project, being the agreed cost of over sizing the drainage project to accommodate the City. The total cost of this project is estimated to be \$4,425,287.50. The City share of this project will be capped at \$4,248,276 and Guenther Development, L.L.C. will provide \$177,012. For a total project cost of \$4,425,288.00

It is anticipated that construction on this project would begin in the 3rd Quarter of 2006 and be completed by December 2007.

POLICY ANALYSIS

This ordinance is a continuation of City Council's commitment to leverage funds with private entities to support infrastructure improvements.

FISCAL IMPACT

This is a one-time capital expenditure in the amount of \$4,248,276. Funds in the amount of \$4,248,276 are available from the 2005 Storm Water Revenue Bonds made payable to Guenther Development, L.L.C.

The table below illustrates the projects funded through the project fund and the fund's balance.

BROADWAY CORRIDOR PHASE I PROJECT FUND	\$9,631,972.00
Developer Participation Contract between the City of San Antonio and Rio Perla Properties, L.P. (Rio Perla) for the Broadway Corridor Storm Water Drainage Project – approved March 10, 2005.	\$4,135,258.00
Amendment to the Developer Participation Contract authorized the cost savings from the Broadway Corridor Storm Water Drainage Project to be used for street and drainage improvements to Pearl Parkway – approved November 17, 2005.	
Professional services agreement with Pape-Dawson Engineers, Inc. for engineering services and drainage improvements along the Broadway Corridor – For future City Council consideration.	\$161,466.40
Developer Participation Contract between the City of San Antonio and Guenther Development, L.L.C. for the Broadway Corridor Watershed SA6 Storm Water Drainage Project – December 15, 2005.	\$4,248,276.00
PROJECT FUND BALANCE	\$1,086,971.60

COORDINATION

This ordinance has been coordinated with the City Attorney's Office, the Office of Management and Budget, the Contract Services Department and the Finance Department.

SUPPLEMENTARY COMMENTS

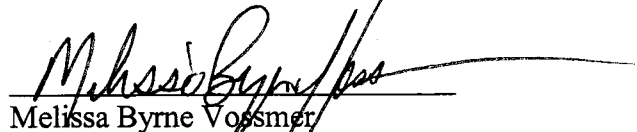
The Discretionary Contract Disclosure Form required is attached.

ATTACHMENTS

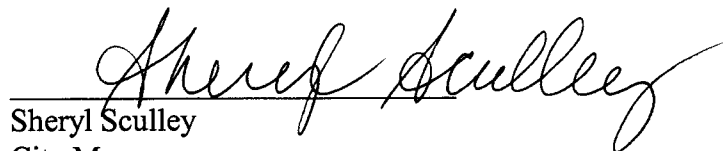
- 1) Project Map



Thomas G. Wendorf, P. E.
Director of Public Works



Melissa Byrne Vossmer
Assistant City Manager



Sheryl Sculley
City Manager